No. 10,387

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRIEDRICH WALTER BERGMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

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The facts of this case have been set forth in the brief previously submitted by the appellee. The brief of the Northern California Branch of the American Civil Liberties Union, *Amicus Curiae,* however, has raised a number of points of law not discussed in the appellant's brief, and which the appellee had not discussed in its brief in the belief that these points were so well settled that no discussion was necessary.

The appellee is particularly interested in refuting the contentions raised by *Amicus Curiae* that citizenship acquired by naturalization is a vested right, in absence of "extrinsic fraud" or "jurisdictional error" in naturalization and cannot be lost except by expatriation; and that the statute under which this proceeding is brought, Section

338 of the Nationality Act of 1940, 54 Stat. 1158 (U.S.C., Title 8, Section 738) is unconstitutional as an interference with the judicial power and also as a violation of the freedom of speech guarantee of the First Amendment. Such theories are contrary to the long line of precedents, both in the United States Supreme Court and in various United States Circuit Courts of Appeals, which, as the United States Circuit Court of Appeals for the Seventh Circuit stated in the recent case of *United States v. Krauss,* 136 F.(2d) 935 (C.C.A. 7th, 1943), (*U. S. ex rel. Harrington v. Schlotfeldt*), were not overruled by the decision of the United States Supreme Court in the recent case of *Schneiderman v. United States,* 87 L. Ed. 1249 (June 21, 1943). The appellee therefore feels it desirable to call this Court's attention to the precedents which have been established upon this subject by the federal courts during the past thirty years.

I. The Constitutionality of the Statute Is Well Established.

The first statute providing for cancellation of naturalization obtained through fraud or illegality was Section 15 of the Act of June 29, 1906, 34 Stat. 601 (formerly U.S.C., Title 8, Section 405). The constitutionality of this statute, which was replaced by Section 338 of the Nationality Act of 1940, was squarely upheld by the Supreme Court in two leading decisions, *Johannessen v. United States,* 225 U.S. 227 (1911) and *Luria v. United States* 231 U.S. 9 (1913). In these two decisions, the Court settled a number of points raised by *Amicus Curiae.* In the *Johannessen* case, for example, the Court squarely held that the "denaturalization" statute could properly be retrospective in application, contrary to the contention of

Amicus Curiae. 225 U.S. 227, 242. Moreover, in the *Luria* case, the Court held that it was not a violation of due process to admit evidence of conduct subsequent to naturalization in order to establish the intent of the defendant at the time of naturalization. 231 U.S. 9, 25, 26, 27.

In both cases, the Supreme Court emphasized the fact that citizenship is a privilege which no alien may obtain except upon full compliance with the statutory requirements laid down by Congress. In the *Luria* case, *supra,* the Court said (p. 23):

> "These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past."

And in the *Johannessen* case, *supra,* the Court stated (pp. 241-242):

> "An alien has no moral nor constitutional right to retain the privileges of citizenship, if by false evidence or the like, an imposition has been practiced upon the Court, wthout which the certificate of citizenship could not and would not have been issued. As was well said by Chief Justice Parker in *Foster v. Essex Bank* (16 Mass. 245, 273), 'There is no such thing as a vested right to do wrong.' "

The Supreme Court has subsequently stated that no alien has the slightest right to naturalization unless all statutory requirements are complied with and that every certificate of naturalization must be treated as granted upon condition that the government may demand its cancellation unless issued in accordance with such requirements. *United States v. Ginsberg,* 243 U.S. 472 (1917); *United States v. Ness,* 245 U.S. 319 (1917); *Maney v. United States,* 278 U.S. 17 (1928). See also *United States v. Schwimmer,* 279 U.S. 644 (1929); *United States v. Macintosh,* 283 U.S. 605 (1931); *United States v. Bland,* 283 U.S. 636 (1931).[1]

As stated in the appellee's previous brief, the *Schneiderman* case does not overrule these fundamental principles established in the various Supreme Court decisions. It seems clear therefore from these precedents that the constitutionality of Section 338 of the Nationality Act of 1940, 54 Stat. 1158 (Title 8, U.S.C., Section 738) is no longer subject to serious challenge.

[1]In the *Macintosh* case, *supra,* the Supreme Court also made it clear that requirements for naturalization are not limited to a mere period of residence in the United States and to a compliance with the requisite procedural formalities. In that case, the Court said (pp. 616, 617):

> "Clearly, it would seem, in order that the court and the government, whose power and duty in that respect these provisions take for granted, may discover whether the applicant is fitted for citizenship;—and to that end, by actual inquiry, ascertain, among other things, whether he has intelligence and good character; *whether his oath to support and defend the Constitution and laws of the United States, and to bear true faith and allegiance to the same, will be taken without mental reservation* or purpose inconsistent therewith; whether his views are compatible with the obligations and duties of American citizenship; whether he will upon his own part observe the laws of the land, *whether he is willing to support the government in time of war, as well as in time of peace,* and to assist in the defense of the country, not to the extent or in the manner that he may choose, but to such extent and in such manner as he lawfully may be required to do. These, at least, are matters which are of the essence of the statutory requirements, and in respect of which the mind and conscience of the applicant may be probed by pertinent inquiries, as fully as the court in the exercise of a sound discretion, may conclude is necessary." (Italics supplied.)

II. The Doctrine of Res Judicata Is Inapplicable.

The *Amicus Curiae* has made much in its brief of the doctrine of *res judicata,* which it contends applies to decrees of naturalization, in absence of "extrinsic" fraud.

Appellee has stated in its previous brief that the doctrine of "extrinsic" fraud has no applicability to "denaturalization" proceedings. In this connection, however, it should be noted that Congress has expressly provided that naturalization may be revoked for one type of "intrinsic" fraud, *i.e.,* lack of intent to reside permanently in the United States. Section 338(b) of the Nationality Act of 1940, (Title 8, U.S.C., Section 738(b)). In *Luria v. United States,* 231 U.S. 9 (1913), the Supreme Court squarely sustained the constitutionality of a similar provision in Section 15 of the Act of June 29, 1906. Further, it might be noted that there were numerous judicial decisions holding that mental reservation of foreign allegiance and lack of attachment to the principles of the United States Constitution constituted fraud for which naturalization might be revoked under Section 15 of the Act of June 29, 1906, 34 Stat. 601, the predecessor statute of Section 338 of the Nationality Act of 1940. *Cf. Schurmann v. United States,* 264 Fed. 917 (C.C.A. 9th, 1920) appeal dismissed, 257 U.S. 621 (1922); *United States v. Kramer,* 262 Fed. 395 (C.C.A. 5th, 1919). By re-enacting this statute substantially without change, Congress incorporated the earlier judicial interpretations under the well-established canon of statutory construction. *Johnson v. Manhattan Ry. Co.,* 269 U.S. 479, 500 (1933); *Federal Communications Commission v. Columbia Broadcasting System,* 311 U.S. 132, 137 (1940); *Commissioner of Internal Revenue v. F. G. Bonfils Trust Co.,* 113 F.(2d) 788, 792 (C.C.A. 10th, 1940). Thus, Congress has

clearly indicated that it intended to make no distinction between "extrinsic" and "intrinsic" fraud in this particular statute.

A careful reading of the Supreme Court decisions relied upon by *Amicus Curiae* demonstrates that these decisions do not support its contention with respect to the doctrine of *res judicata.* Attention is called to the language of the Supreme Court in *United States v. Ginsberg,* 243 U.S. 472 (1917) at page 475:

> "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in Sec. 15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence non-essential."

And in *United States v. Ness,* 245 U. S. 319 (1917), the Court held that the right of the government to contest a petition for naturalization and the "denaturalization" procedure were *cumulative* remedies against fraudulent or illegal naturalization. In this connection, the Court said (pp. 325-326):

> "The remedy afforded by §15 for setting aside certificates of naturalization is broader than that afforded in equity, independently of statute, to set aside judgments, *United States v. Throckmorton,* 98 U.S. 61; *Kibbe v. Benson,* 17 Wall. 624; but it is narrower in scope than the protection offered under §11. Opposition to the granting of a petition for naturalization may prevail, because of objections to the competency

> or weight of evidence or the credibility of witnesses, or mere irregularities in procedure. A decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under §11. For Congress did not see fit to provide for a direct review by writ of error or appeal. But where fraud or illegality is charged, the act affords, under §15, a remedy by an independent suit 'in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit.'"

The acceptance of complete and undivided allegiance to the United States and its institutions, and the willingness to defend this country at all times against all enemies, without reservation, have been described by the Supreme Court to be "of the essence of the statutory requirements" for naturalization, *United States v. Macintosh, supra.* Surely the *Ness* and *Ginsberg* cases do not mean that one may commit such a fraud in naturalization and acquire a vested right to citizenship, though one's naturalization may be subect to revocation at any time for an innocent procedural irregularity. Such an interpretation of the statute would be manifestly absurd and would defeat the fundamental purposes of the naturalization law, *i.e.*, to admit to citizenship only those persons who will be "citizens in fact as well as in name."

In this connection the *Amicus Curiae* has relied heavily upon the case of *United States v. Sakharam Ganesh Pandit,* 15 F.(2d) 285 (C.C.A. 9th, 1926), certiorari denied 273 U. S. 759. In that case, the government had contested the petition for naturalization on the ground that the petitioner was racially ineligible. The District Court hav-

ing ruled against the government, this Circuit Court of Appeals held that the decree of naturalization was *res judicata* as to this issue. In the instant case, the government did not contest the petition for naturalization, as indicated in the opinion of the District Court. Therefore, it is submitted that the *Pandit* case is inapplicable to the facts of the instant case.

The Constitutional Guarantee of Free Speech Is Not Violated.

Since *Amicus Curiae* has also placed much stress in its brief upon the alleged violation of the First Amendment, it seems desirable to elaborate upon the appellee's statement relative thereto in its previous brief.

It should be emphasized that this is not a prosecution for sedition and therefore the "clear and present danger" rule of *Schenck v. United States,* 249 U.S. 47 (1918) has no applicability. The purpose of introducing the defendant's statements into evidence is to assist the court in determining what his state of mind was at the time of naturalization. As in any other civil case, the statements made by the defendant when pertinent and not privileged, may be used as evidence without violating the constitutional right of free speech. If this were not so, it would be impossible to prove the ultimate fact in issue, *i.e.*, the defendant's state of mind at the time he was naturalized, in any of these cases where the charge is fraud on the ground of mental reservation of foreign allegiance. Manifestly, the test of the *Schenck* case, *i.e.,* the "clear and

present danger" of causing a breach of peace or other substantive evil, has nothing to do with the method of proof of an intangible fact such as fraudulent intent at the time of swearing allegiance to the United States.

The government submits that the question of free speech may be directly involved in "denaturalization" cases where the charge is solely fraud upon the ground of lack of attachment to the principles of the United States Constitution and where the evidence consists solely of criticism of the government and its policies. For example, the *United States v. Rovin,* 12 F.(2d) 942 (E.D. Mich., 1926), the District Court held that a naturalized citizen, in advocating certain changes in the Constitution by peaceful means, was merely exercising his rights under the First Amendment and had not shown thereby a lack of attachment to the principles of the Constitution. In sharp contrast is the instant case in which the government has shown, by a preponderance of clear and convincing evidence of very high type witnesses that the appellant has consistently manifested an attitude of disloyalty to the United States, a desire to help Germany and to see the United States lose the war, and a desire to supplant the poltical institutions of this country, including that of freedoom of speech, by a Nazi dictatorship. Surely the First Amendment was not intended to render the people of the United States helpless against the perpetration of such a gross and palpable fraud. That the federal courts have never so construed the First Amendment may be seen clearly from the discussion of the leading precedents as to mental reservation of allegiance in naturalization, which follows below.

The Rule of Schurmann v. United States Is Applicable.

In no "denaturalization" case before the Supreme Court has the Court had occasion to consider directly the charge of fraud in naturalization based upon a mental reservation of foreign allegiance. The clearest expression of opinion by the Court on the matter may be found in *United States v. Macintosh,* 283 U.S. 605, 616, 617 (1931), where the Court said in reference to a petitioner for naturalization, that "whether his oath to support and defend the Constitution and laws of the United States, and to bear true faith and allegiance to the same, will be taken without mental reservation or purpose inconsistent therewith; . . . whether he is willing to support the government in time of war, as well as in time of peace . . . are matters which are of the essence of the statutory requirements . . ."

In four leading decisions of various United States Circuit Courts of Appeals, it has been held that one who accepts the high privilege of American citizenship and still retains any allegiance to his former country has obtained his naturalization by fraud, so that his certificate of naturalization should be revoked under the remedy provided by Congress. In none of these cases did the Courts doubt the constitutionality of the remedy, either on the ground of interference with the judicial power, or of retroactivity of the statute, or of violation of the First Amendment, though in all cases naturalization was revoked upon the basis of evidence of disloyal acts and conduct occurring subsequent to the date of naturalization. *Schurmann v. United States,* 264 Fed. 917 (C.C.A. 9th,

This issue was not involved in the *Schneiderman* case.

1920), appeal dismissed 257 U.S. 621 (1922); *United States v. Kramer,* 262 Fed. 395 (C.C.A. 5th, 1919); *United States v. Krause,* 136 F.(2d) 935 (C.C.A. 7th, 1943); *United States v. Baumgartner,* (C.C.A. 8th, September 11, 1943).

The *Schurmann* case, *supra,* decided by this Circuit Court of Appeals is the leading case upon this point and has been followed by many other federal courts. In that case, the defendant, a native of Germany, was naturalized in the United States in 1904. The Court, in affirming a decree canceling the defendant's certificate of naturalization, said (pp. 918, 920):

> "In behalf of the United States there was abundant evidence that, before and after the declaration of war between the United States and Germany, Schurmann frequently praised the attitude of the Germans, defended the sinking of the Lusitania, said that he wanted to get over to Germany to be a surgeon in the German hospitals, anything Germany did was justified by her right to be supreme, said that America was wrong in entering the war, and that it was impossible to defeat Germany, advised against 'waste' of money in buying Liberty Bonds, said he wanted to get into Mexico,and by many other remarks indicated beyond any possible doubt that his feelings were entirely on the side of Germany as against the United States, as well as the other countries at war with Germany . . .
>
> "Was the lower court justified in holding that Schurmann, by reason of his attitude and declarations and expressions during the years 1916 and 1917, before and after the United States was at war with Germany, swore falsely in 1904 when he declared that he absolutely and entirely renounced and

adjured all allegiance and fidelity to the German government and emperor. Under the circumstances of the case, the only way of arriving at what the fidelity and allegiance of Schurmann were in December, 1904, is by trying out his attitude of mind and heart in the later years of 1916 and 1917, when, under then existing conditions men were specially aroused to give utterance to their real sentiments and to avow loyalty to one or another of the belligerent nations. Prior to 1916 his life seems to have been without special event indicative of patriotic feeling. But it was in the crucial times of 1917 that the respondent failed in the fundamental obligation to his oath of true faith and allegiance in 1904.

"One who spoke in that way, and whose frequent expressions were so plainly against the United States and in favor of Germany, must have taken the oath of full faith and allegiance with a reserved determination to be kept down, but nurtured, until a momentous time might come. In years, however, the time did come, and the criterion of original fraud must be the later conduct, which, in its relation to the earlier attitude, will furnish safe ground for judgment."

It is submitted that the *Schurmann* case governs the instant case, and that the principle of law set forth in that case is applicable here. As this Court pointed out in that case, it does not matter if a man for some years after his admission to citizenship gives no indication of his true feelings, when there is no occasion for him to do so. If, at the time of the crucial test of conflict between his adopted country and his native country, he clearly demonstrates that his true allegiance is to the latter, then it may

fairly be presumed that he never did renounce allegiance to the country of his birth.

Many other courts have applied the theory of the *Schurmann* case that a man's conduct at or about the time conflict arises between his former and his adopted country is the strongest proof on the question whether he in good faith swore allegiance to the United States. *United States v. Krause, supra; United States v. Baumgartner, supra; United States v. Wursterbarth,* 249 Fed. 908 (D. N.J., 1918); *United States v. Darmer,* 249 Fed. 989 (W.D. Wash., 1918); *United States v. Herberger,* 272 Fed. 278 (W.D. Wash., 1921); *United States v. Ebell,* 44 F. Supp. 43 (W.D. Texas, 1942) *United States v. Mickley,* 44 F. Supp. 735 (E.D. Mich., 1942); *United States v. Fischer,* 48 F. Supp. 7 (S.D. Fla., 1942); *United States v. Kuhn, et al.,* 49 F. Supp. 407 (S.D.N.Y., 1943); *United States v. Schuchhardt,* 49 F. Supp. 567 (N.D. Ind., 1942).

"Denaturalization" Is a Remedy Separate and Independent From Expatriation.

A careful reading of the Nationality Act of 1940 reveals the fundamental error in the contention of *Amicus Curiae* that the government is attempting to substitute "denaturalization" as a remedy for expatriation.

Section 338 of the Act (Title 8, U.S.C., §738) providing for "denaturalization" proceedings, appears in subchapter III of the Act, "Nationality Through Naturalization". Section 338 provides a remedy for the revocation

of naturalization *ab initio,* where such has been procured fraudulently or illegally.

The expatriation provisions of the Act appear in subchapter IV, "Loss of Nationality" and prescribe the methods by which American citizens, both native-born and naturalized, may renounce or abandon their citizenship. Section 408 of the Act (Title 8, U.S.C., Section 808), to which reference is made in the *Amicus Curiae* brief, provides: "The loss of nationality *under this chapter* shall result solely from the performance by a national of the acts or fulfillment of the conditions specified *in this chapter.*" (Italics supplied.) It seems clear that this provision was not intended to nullify the remedy of cancellation of naturalization expressly provided by Congress in another section of a different chapter of the same statute.

The Affidavit Is Not Jurisdictional.

In reference to the contention of *Amicus Curiae* that an affidavit is prerequisite to the maintenance of a suit under Section 338(a), the contrary view was expressed not only by this Circuit Court of Appeals in *Schwinn v. United States,* 112 F.(2d) 74 (C.C.A. 9th, 1940), affirmed 311 U.S. 616, but by other courts in *United States v. Leles,* 227 Fed. 189 (N.D. Calif., 1915) and in *United States v. Knight,* 291 Fed. 129 (D. Mont., 1923), affirmed 299 Fed. 571 (C.C.A. 9th, 1924).

In the *Schwinn* case, *supra,* 112 F.(2d) 75, 76, this Court quoted with approval the opinion of the District

Court in the *Knight* case, *supra* (291 Fed. 130): "The statute is inclusive, not exclusive, and. like statutes for actions on complaints by private prosecutors, does not preclude public prosecutors from proceeding of their own motion to enforce the laws." This interpretation of the statute is clearly applicable to the instant case.

An analysis of the case of *United States v. Salomon,* 231 Fed. 928 (C.C.A. 5th, 1916) indicates that that decision is not in conflict with the view which this Court expressed in the *Schwinn* case. In the *Salomon* case, the Court affirmed the dismissal of the suit because neither the petition nor the affidavit charged the commission of any fraud. Since the affidavit failed to state facts "showing good cause" for the institution of "denaturalization" proceedings, the Court held that it was defective under the statute. This decision is not therefore a direct precedent for the rule that an affidavit is jurisdictional under Section 338.

The Sufficiency of the Complaint Cannot Be Attacked Upon Appeal.

The contention made by *Amicus Curiae* that the complaint fails to state a sufficient cause of action may be quickly disposed of by reference to the Federal Rules of Civil Procedure, which governs procedure under Section 338 of the Nationality Act of 1940 in most respects. Rule 81(a)(6). Rule 12 prescribes the mode by which defendants may raise objections to a complaint and expressly provides that a party may move within twenty days after

the service of the pleading upon him for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. (Rule 12(e).) Since the defendant did not avail himself of this provision of Rule 12 and has answered the complaint and defended the suit on the merits, the sufficiency of the complaint as to pleading cannot be questioned now.

Conclusion.

It is respectfully submitted the judgment of the court below should be affirmed.

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